IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 75

WILMETTE PARK DISTRICT,
Petitioner,

v.

NIGEL D. CAMPBELL, Collector of Internal Revenue.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR THE ~~RESPONDENT~~ PETITIONER.

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I and II.

1. The tax upon charges for admission to *any* place was not intended to tax every charge on every admission to every place. In arguing that every such charge was intended to be taxed, respondent ignores the many charges for admissions never made subject to this tax as well as those charges which respondent admits are not subject to the tax.[1]

2. The fact that fees charged by *private* clubs and commercial enterprises as *mixed* use and admissions charges are subject to this tax has no bearing on the

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[1] Golf greens fees, S. T. 357, I-1 C. B. 434; charges for admission to and use of tennis courts, Respondent's Brief, p. 14 n. 8.

issue of the applicability of the tax to charges to defray the cost of providing public park facilities. The cases cited by respondent, Respondent's Brief, p. 12, deal only with private and commercial enterprises. No private or commercial activity is involved here. The beach is operated by petitioner at cost or at a loss, R. 14(b), in the exercise of petitioner's function of providing park facilities. The facilities provided include toilets, a bathhouse, lifeguards, playground equipment, etc., all directly related to the traditional health, safety and recreational functions of parks. To interpret the admissions tax as applying to charges made to defray the cost of maintaining such facilities is to strain the congressional intent. For Congress expressed its intent to limit the tax to luxuries and spectacles such as picture shows, theatres, circuses, entertainments, cabarets, etc. Petitioner's Brief, pp. 10-11.

3. Consistent interpretation of the basic statute from 1917 to 1941 is a further indication of the intent that such charges not be taxed. In the first 22 years after the publication in 1919 of the regulations specifically relied upon by respondent, Treasury Regulations 43 (1919 ed.), Pars. 5, 8, 9 and 10, Respondent's Brief, p. 13 n. 7, respondent made no attempt to impose this tax upon the fees charged by petitioner and the thousands of similar park units for the use of such facilities. Where a tax is not applied to a particular type of activity for 22 years, the only inference that can be drawn from congressional silence and inaction is that Congress intended no such tax.

III.

4. The operation of a bathing beach is a proper park function and respondent has conceded, Respondent's Brief, p. 29, that park activities are constitutionally immune from federal taxation. To hold that the maintenance of

a public beach is not a park function would only result in park authorities being, to the extent of this tax, less able to take advantage of available natural resources capable of giving riparian communities the very benefits which, because of their health and recreation aspects, render park functions immune. To confine park functions to green grass, a baseball field, benches, rings and swings, is to create an artificial characterization at odds with the reason and real basis of the park immunity. Where the purpose of the immunity can be fulfilled by the public operation of public beaches, such beaches, coming within the purpose of the immunity, must also be immune.

5. The fact that a beach operated as a commercial enterprise for a profit would be taxable does not make the public operation of a beach at or below cost also taxable. Quite the contrary. For it was the *commercial* operation of the football spectable, mineral water industry and liquor stores which made those activities taxable in *Allen* v. *Regents,* 304 U. S. 439, *New York* v. *United States,* 326 U. S. 572, and *Ohio* v. *Helvering,* 292 U. S. 360, respectively.[2] Petitioner concedes that had the beaches been operated as a business for the purpose of making a profit,[3] the fees charged to its users would be subject to this tax. But its non-commercial, non-profit nature removes the activity from the holding and reasoning of the line of cases cited by respondent. And the fact that the beach performs the traditional park functions of health and recreation places it among park activities admittedly immune.

6. Respondent admits, arguendo, not only that the maintenance of public parks is immune but that this bath-

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[2] In these cases the enterprises were not only commercial; they were in fact profitable.

[3] Profit is used in its normal business sense to mean excess of income over costs. Compare Respondent's Brief, p. 31.

ing beach is maintained by petitioner in the interest of the health and welfare of the public. Respondent's Brief, p. 29. He argues, however, that liquor and football games are also related to health and welfare and are nevertheless taxed. This is conceded. But the *commercial operation* of football games and liquor stores was not related to health and welfare. Only because of their commercial nature were these activities taxed.[4] No such commercial activity is carried on by petitioner. And thus no tax can be justified on the basis of the liquor-mineral water-football game reasoning.

7. If the providing of a public beach as a part of a public park system is an immune activity, the limited power of the federal government, because of the very nature of constitutional immunity, does not include the power to interfere with, restrict, or burden that activity by a tax either directly upon the state government maintaining the beach or directly upon those who make use of the beach and for whose benefit the immunity exists. In this phase of his argument, respondent is willing to assume that the beach activity is immune. Respondent's Brief, p. 20. But despite this immunity, he argues that the fees paid by beach users can be taxed since the first impact of the tax falls not on petitioner but on the public.

If the beach activity is immune, it is because such activity is within the health and welfare purposes of accepted park activities. If this is so the *activity* is immune and therefore beyond the reach of the federal government. To admit that the federal government cannot impose a tax on

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[4] In the Regents case, to the extent that the football games were assumed by the court to be an integral part of the State's program of public education, i. e., for the student participants and student spectators, they were not taxed. Allen v. Regents, 304 U. S. 439, 450.

the activity or directly on the government which provides it, and then to state that the federal government can nevertheless tax the users of the beach, is to give immunity a new meaning.[5] For the activity can hardly be immune if tribute can be exacted from those who seek to enjoy the activity before they are permitted to do so.

Not even respondent's mathematical mumbo-jumbo can hide the realistic burden on the "immune activity" and the realistic barrier erected between the public and the public beach by the imposition of this tax. There can be no question but that in the language of constitutional law, a "burden," "limitation" or "interference" results from the imposition of a 20% tax on the fees paid by the public to defray the cost of maintaining these facilities. The increased charge does not disappear by stating that it is not a barrier.

Respondent's theory is that a tax on those who benefit from an immune activity is not an unconstitutional burden while a tax *directly* on the local government which maintains the immune activity is such a burden. His theory proves too much. For, if correct, a tax could be imposed on those benefited by such immune activities as filing suits in state courts, attending public schools, receiving police protection, etc., all on the theory that since it is the person who pays, rather than the state, no "burden" exists.

Equally untenable is respondent's argument that the barrier which exists between the citizen and the benefit can be eliminated by a reduction in the amount of the fees charged by petitioner. Respondent's Brief, pp. 21-22.

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[5] See Lewis Carroll, Through the Looking Glass, Chapter VI: " 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'It means just what I choose it to mean—neither more nor less.' "

Such reduction would merely shift the tax from the bather to petitioner. Thus the method suggested for removing the barrier created by the tax on the citizen results in the very type of direct tax upon petitioner which respondent assumes, in this part of his argument, to be unconstitutional.

Respectfully submitted,

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